Supreme Court, U.S.
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No. 98-757

In the
Supreme Court of the United States
October Term, 1998

DAYS INNS OF AMERICA, INC.
AND HFS INCORPORATED,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Days Inns of America, Inc., and HFS Incorporated respectfully submit this reply brief in support of their petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

ARGUMENT

I. The "Interlocutory" Nature Of The Eighth Circuit's Decision Does Not Weigh Against Review By This Court.

The issue presented by this Petition is purely a question of law: What parties may be held liable under Section 303 of the Americans With Disabilities Act? Although the Eighth Circuit remanded this case to the district court to determine whether Petitioners had "actual knowledge" of ADA violations at the Wall Facility, that question has no bearing on the issue presented by the Petition. Because the legal issues presented on appeal are fully-developed, this case is ripe for review by the Supreme Court. *See Atherton v. F.D.I.C.*, 519 U.S. 213 (1997) (review on writ of certiorari of a decision on an interlocutory appeal where the case focused on a legal issue); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (granting interlocutory certiorari where the "correctness of the decision of the court below depends upon the scope and meaning" of a constitutional provision).

This Court has reviewed "interlocutory" decisions to address issues that are "fundamental" to further proceedings. For example, in *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949), the Court granted a petition for writ of certiorari to review a circuit court decision reversing and remanding a district court's grant of preliminary relief. Noting that, "The judgment of the Court of Appeals was not a final one," the Court stated, however, that, "[W]e

considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" 337 U.S. at 685 n. 3, *citing Land v. Dollar*, 330 U.S. 731, 734 (1947). *See also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (review of appellate court decision remanding case for trial where ruling was "fundamental to the further conduct of the case"); *Randolph Cent. School Dist. v. Aldrich*, 506 U.S. 965 (1992) ("[W]here there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review.") (White, J., *dissenting* from denial of certiorari) (citations omitted). The question to be resolved is whether a party that does not own, operate, or lease a facility may be held liable under Section 303 of the ADA. Review by the Court may obviate the need for further proceedings between these same parties now pending, in addition to this case, in two federal district courts and two federal courts of appeals and will assure that the issue can be resolved consistently in those pending proceedings. The issue presented by this Petition is, thus, plainly "fundamental" in nature.

Further, although Respondent characterizes the question presented by the Petition as "novel," the proper interpretation of Section 303 is a matter of general public interest, affecting far more than just the parties to this case, as the brief of *amicus curiae*, the Internation..! Franchise Association, demonstrates. First, the question of who may be held liable under Section 303 of the ADA is obviously one of great importance for franchisors and franchisees. Second, given the very significant role that franchising plays in the nation's economy, this issue also affects the general public. Finally, the impact of the Eighth Circuit's decision concerning liability under Section 303 is not limited to franchising, but reaches

any entity that might have some involvement in the design and construction of a facility.

II. The Eighth Circuit's Decision Fails To Give Effect To The Plain Language Of The Statute.

Respondent urges the Court to reject an interpretation of Section 303 that limits the reach of that section to owners, operators, lessors, and lessees because "federal courts are under a 'duty to refrain from reading a phrase into the statute when Congress has left it out.'" (Opposition at 13, citations omitted.) Yet this is precisely what Respondent's interpretation of the statute does.

Respondent contends that, because Section 303 does not identify responsible parties, Congress must have intended that any party engaging in "prohibited conduct" could be held liable. (Opposition at 9.) The statute does not, however, prohibit the design and construction of inaccessible facilities, as Respondent appears to believe. Rather, it prohibits the failure to design and construct facilities that are accessible. Thus, when a facility is inaccessible, there is no logical limit, based on the language that describes the prohibited conduct, on the parties who are liable. In other words, when a facility is not accessible, anyone and everyone has "failed" to make it accessible. Anyone and everyone has engaged in prohibited conduct. Anyone and everyone is liable.

Plainly, this is not what Congress intended. In order to avoid what would be a patently absurd result, but also avoid Section 303's reference to Section 302(a), it is Respondent that reads into the statute a limitation on liability that is nowhere to be found in the plain language. Respondent contends that "anyone . . . with the requisite interest, authority, and control" may be held liable for failure to design

and construct an accessible facility." (Opposition at 9.) Respondent, thus, recognizes that, without some limitation on the scope of liable parties, liability is so broad as to be rendered meaningless. In order to save an interpretation that does not limit Section 303 to owners, operators, lessors, and lessees of covered facilities, it is Respondent, not Petitioners, that has attempted to "rewrite" the statute.

An interpretation that incorporates Section 302(a) into Section 303 gives effect to all of the plain language of the statute in a way that reasonably limits the scope of liability without "implying" additional language to avoid an absurd result. As discussed in the Petition, Section 303's use of the phrase "as applied to public accommodations and commercial facilities" unambiguously applies the requirements of Section 303 to both public accommodations and commercial facilities. (Petition at 13-14.) This language, thus, avoids the "coverage gap" claimed by Respondent to arise from an interpretation that incorporates Section 302(a)'s identification of liable parties as part of Section 303. Respondent has no response to this argument.[1]

Further, the interpretation urged by Respondent is unworkable practically. The statute does not use, much less define, the concepts of "requisite interest, authority, and control" over design and construction. Indeed, even the way in which Respondent has formulated the legal test — "requisite interest, authority, and control" — shows how ill-defined that test is. Respondent's interpretation provides the public, which must comply with the statute, and the courts,

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[1] Nor does Respondent respond to the argument that the phrase "design and construct" was intended to establish the effective date of the new construction provisions of the Act (*i.e.* "design and construct for first occupancy later than 30 months after the date of enactment of the Act.").

which must apply the statute, with absolutely no guidance on how much "interest, authority, and control" over design and construction is enough to trigger liability. It is unreasonable to think that Congress, on the one hand, intended to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" (42 U.S.C. § 12101(b)(2)) and, on the other, defined the scope of liability in such a way as to ensure virtually endless litigation over whether a party had sufficient control over design and construction to make that party liable.

In contrast, the party or parties who own, operate, or lease a facility would be, in most cases, easily identifiable. Holding those parties liable when newly constructed facilities are inaccessible would, unlike the interpretation advocated by Respondent, further Congress's goal of creating "clear, strong, consistent, enforceable standards" and encourage compliance. In fact, in each of the cases brought by Respondent against Petitioners, the owner/operator of the facility was also a defendant and in each case the owner/operator entered into an agreement with Respondent under which it agreed to make modifications necessary to bring the facility substantially, if not completely, into compliance with the requirements of the ADA.

III. Respondent Misconstrues The Legislative History.

Respondent argues that, because Congress included the "owns, leases (or leases to) or operates" language as part of Section 302 and not Section 303, this reflects an intent to make parties other than owners, operators, lessors, and lessees liable under Section 303. (Opposition at 14.) This argument is misplaced. As discussed in the Petition, Congress described Section 302(a) as the "General Rule of Title III." (Petition at 23.) Congress intended this "General Rule" to

apply to both Section 302 and 303. Having amended the General Rule, there was no reason for Congress to amend Section 303, any more than there was a reason to amend 302(b), because both Sections explicitly referred back to Section 302(a).

Further, Respondent cites, in support of its characterization of the legislative history, not authoritative legislative history, but rather, comments made in floor debates and comments made in public hearings by representatives of the American Institute of Architects. Reliance on these comments, as opposed to the authoritative legislative history, is misplaced. First, comments made by people who are not members of Congress, such as representatives of the American Institute of Architects, plainly do not reflect the views of Congress and are not properly considered legislative history. *Kelly v. Robinson*, 479 U.S. 36, 50 n.13. (1986). Second, the Court eschews reliance on passing comments and casual statements made by individual members of Congress in floor debates in determining Congressional intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984). *See also Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen.") *Cf.* Petition at 20 (discussing reports of House and Senate committees).[2]

[2] Respondent's one citation to an official committee report addresses a process for obtaining certification that a state law or local building code meets or exceeds the minimum requirements of the ADA. This provision, reported the House Committee on Education and Labor, "is intended simply to allow builders and architects to use codes and laws with which they are familiar." House Report No. 101-485(II) at 126, *reprinted at* 1990 U.S.C.C.A.N. at 409. This statement, of course, is not inconsistent with interpreting Section 303 to hold only owners, operators, lessors, and lessees liable. Even though not directly liable for violations of the ADA,

Finally, to the extent the Court gives weight to comments made in floor debates, statements by Representative Hamilton Fish of New York, reflect the understanding of one of the bill's sponsors that it would be owners and operators who would be liable for failure to design and construct accessible facilities. (*See* Petition at 21-22.)

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architects and builders would still, presumably, be liable to building owners for professional negligence if they designed and built a facility that did not comply with the law and would still have an interest in complying with the requirements of the ADA to avoid such potential liability.

CONCLUSION

For the foregoing reasons and for the reasons set out in the Petition, Days Inns of America, Inc., and HFS Incorporated respectfully request that their Petition for Writ of Certiorari be granted.

Dated: March 1, 1999

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